No. 21080

United States
COURT OF APPEALS
for the Ninth Circuit

PACIFIC INLAND NAVIGATION COMPANY,
a corporation,

Appellant-Cross-Appellee.

v.

DELBERT A. COURSE,

Appellee-Cross Appellant

Appeal from the United States District Court
For the District of Oregon

HONORABLE JOHN F. KILKENNY

BRIEF OF APPELLANT

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 7-66

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JURISDICTION

The vessel was on navigable waters of the United States. Being a maritime injury, the District Court on the Admiralty side had jurisdiction to hear the cause under Sec. 2 of Article III of the United States Constitution, and Title 28, U. S. C., Sec. 1333 (1). The jurisdiction of this Court to review the District Court's decision is based upon Section 1291 of Title 28 U.S.C., this appeal having been taken from a final decree entered on December 20, 1965.

STATEMENT OF THE CASE

This action involves a Libel in Personam for dam-

ages for unseaworthiness of the tug "BANNOCK" instituted by a ship repairman-marine electrician, Delbert A. Course, appellee, against his employer-shipowner, Pacific Inland Navigation Company, appellant. It arose from a shipboard accident on December 19, 1963, at Vancouver, Washington, when appellee fell through a hatchway while en route from the vessel to the repair yard for a shoreside purpose. (Findings of Fact and Conclusions of Law). The tug "BANNOCK" was wholly owned and operated by appellant. Appellant maintained a ship repair yard at Vancouver, Washington, for the sole purpose of repairing its own vessels. Appellee was employed as a marine electrician and had been in appellant's repair yard for more than one year prior to his injury. At all times appellee was under the supervision and control of appellant's repair yard supervisory personnel. At the time of appellee's injury the vessel was undergoing certain repairs and was solely under the control of appellant's ship repair personnel.

Appellee received from appellant the statutory benefits of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901-950, inc.

The trial resulted in a verdict in favor of appellee in the amount of $12,566.08.

In the Pretrial Order and by a separate pretrial motion, appellant sought a dismissal of the action on the ground that appellee, having received his statutory entitlements from his employer, was precluded from maintaining this action. The District Court denied appellant's motion upon the authority of the case of *Reed* v.

SS YAKA, 373 U.S. 410 (Findings of Fact and Conclusions of Law). Appellant in the Pretrial Order and by post trial motions raised the defenses that at the time of appellee's injury he was not engaged in work traditionally performed by a seaman and was therefore not entitled to the warranty of seaworthiness; and that at the time when appellee was injured the vessel was a dead ship and was out of navigation and therefore did not warrant her seaworthiness. Both of these defenses were denied by the District Court (Findings of Fact and Conclusions of Law).

SPECIFICATIONS OF ERROR

1. The District Court erred in denying appellant's Motion for Summary Judgment, because appellee is not entitled to bring a cause of action against his shipowner-employer under the authority of *Reed* v. *SS YAKA, supra.*

2. The District Court erred in holding that the tug "BANNOCK" was not a "dead" ship and that she was in "navigation."

3. The District Court erred in holding that appellee was entitled to the warranty of seaworthiness, although he was at the time of his injury engaged in a shoreside activity.

SUMMARY OF ARGUMENT

1. The provisions of the Longshoremen's and Harbor Workers' Compensation Act immunize a shipowner-em-

ployer from an action for unseaworthiness by his employee and the maintenance of such an action would conflict with the economic standards of the Act and produce a harsh and incongruous result.

2. The holding of *Reed* v. *SS YAKA, supra,* even if valid in its factual framework of that case, is inapplicable to the case at bar because appellant shipowner owned and operated the tug "BANNOCK" and no third party was involved.

3. The rationale employed by the Supreme Court in deciding that Reed should be accorded the same protection whether he sustained injury while employed by a stevedore or directly by a shipowner is not applicable to appellee because appellee was in the appellant's steady employ and is not a longshoreman.

4. A vessel under the control of a ship repairer, with her main engines dismantled, is a dead ship and out of maritime service, and does not warrant her seaworthiness.

5. A ship repairman who at the time of his injury is not engaged in work traditionally performed by a seaman is not entitled to the warranty of seaworthiness.

ARGUMENT

The Longshoremen's and Harbor Workers' Compensation Act Precludes Maintenance of Action.

> "Like other workmen's compensation laws the Longshoremen's and other Harbor Workers' Compensation Act involves a relinquishment of certain legal rights by employees in return for similar sur-

render of rights by employers. Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardless of fault their liability to an injured workman is limited under the Act. In some instances injury to an employee is caused by a third party. In such circumstances, Sec. 33 of the Act reserves to the employee the right to seek damages against the third party." U. S. Code Congressional and Administrative News, Vol. 2, page 2134, Senate Report No. 48.

The employer immunity provision of the Act is found in 33 U.S.C. § 905:

"Exclusiveness of Liability. Sec. 5. The liability of an employer prescribed in Sec. 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Chapter or to maintain an action at law, or in admiralty for damages on account of such injury or death."

In some cases injury to an employee is caused by a third party. In such cases the Act preserves to the employee the right to seek damages against a third party. This provision of the Act is found in 33 U.S.C. § 933 (a):

"Compensation for Injuries Where Third Persons are Liable Sub Sec. (a) If on account of a disability or death for which compensation is pay-

able under this Chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

The complete immunization of the employer (with one exception hereinafter noted) from personal injury actions brought by an employee has long been recognized by the Supreme Court in the following cases:

Nogueira v. *N.Y.N.H. and H.R. Co.,* 281 US 128 (1929).

South Chicago Co. v. *Bassett,* 309 U.S. 251 (1940).

Swanson v. *Marrah Bros.,* 328 U.S. 1 (1945).

Ryan v. *Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956).

In the recent case of *Ryan* v. *Pan-Atlantic SS Corp.,* 350 U.S. 124 (1956), the Court stated at page 129:

> "The obvious purpose of this provision is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability of *such employer to its employee,* or *to anyone* claiming under or through such employee *on account of his injury or death arising out of that employment.* In return the employee and those claiming under or through him are given a substantial *quid pro quo* in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims. . . . Therefore, in the instant case, it excludes the liability of the stevedoring contractor to its longshoreman and to his kin, for damages on account of the longshoreman's injuries. At the same time, however, Sec. 5 expressly preserves to each employee a right to recover damages against third persons."

In the dissenting opinion of the *Ryan* case, *supra,* Justice Black, the author of the majority opinion in *Reed* v. *SS YAKA, supra,* stated at page 140:

> "And while Congress imposed absolute liability on employers they were also accorded counter-balancing advantages. They were no longer to be subjected to the hazards of large tort verdicts. Under no circumstances were they to be held liable to their own employees for more than the compensation clearly fixed in the Act."

As previously mentioned there is an exception to the exclusive immunity doctrine which arises from the voluntary assumption of obligations by the employer running to the vesselowner, which have given rise to numerous indemnity suits by the vesselowner against the employer. This exception is well illustrated in the language of *Ryan* v. *Pan-Atlantic SS Corp., supra,* at page 131:

> "While the Compensation Act protects a stevedoring contractor from actions brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the shipowner, to load the cargo properly. . . .
>
> "The Shipowner's action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employee. The third-party complaint is grounded upon the contractor's breach of its purely consensual obligation *owing to the shipowner* to stow the cargo in a reasonably safe manner. Accordingly, the shipowner's action for in-

demnity on that basis is not barred by the Compensation Act."

The case of *Smith* v. *The MORMACDALE,* 198 F.2d 849, 3 Cir., (1952) cert. den. presents the same factual situation as the case at bar, with the exception that Smith filed an *in rem* action whereas Course filed *in personam.* It was there held that where a ship is owned by the employer, the exclusive provisions of the Longshoreman's Act controls, saying at page 850:

"To impose this additional liability on the employer where he is also the shipowner would radically distort the intent of Congress in enacting the Longshoremen's Act. . . .

"The identical point argued here was raised in *Samuels* v. *Munson SS Line, supra,* in a well-reasoned opinion that court pointed out the absurd results which would arise if a longshoreman were permitted to accomplish what is here attempted. We agree with the reasoning and the result of that opinion."

These decisions have never been overruled by the Supreme Court either before or after the case of *Reed* v. *SS YAKA, supra.* Consequently, the Court is compelled to make the same holding, namely, that a shipowner-employer may not be sued for damages by an employee because of the exclusive provisions of the Act.

Reed v. SS YAKA, a Third Party Case

We are now brought to an analysis of the case of *Reed* v. *SS YAKA,* and to distinguish its unique facts from those at bar. In reading *Reed* v. *SS YAKA, supra,*

as an authority to permit the maintenance of appellee's libel in personam against appellant herein is clearly in error. *Reed* v. *SS YAKA, supra,* arose from a bare boat charter executed by Waterman Steamship Co., owner of the SS YAKA, to Pan-Atlantic Steamship Co., Reed's employer. The charterparty contained a full indemnity and hold harmless agreement running to Waterman. While Pan-Atlantic was in full control and possession of the vessel as owner *"pro hoc vice"* under its bare boat charter, Reed, Pan-Atlantic's longshoreman employee was injured. Reed filed a Libel in Rem for unseaworthiness against the SS YAKA. Waterman appeared as owner and claimant and impleaded Pan-Atlantic for indemnity. With the case in this posture Pan-Atlantic, as a defense to the indemnity action, sought to interpose section 905 of the Act. The District Court (E.D. Pa. 1960), 183 F. Supp. 69, held that this defense was not available to Pan-Atlantic. The District Court held that Reed could recover in rem against the SS YAKA for unseaworthiness and that Waterman, under the indemnity clause of the bare boat charter, was entitled to full indemnity from Pan-Atlantic. United States District Judge Clary in the course of the decision admitted the result would be different if one person (as here) is both owner and employer, saying:

> "There are reasons why a court might find otherwise when only one person is involved as owner-stevedore combined." (page 77)

On appeal to the 3rd Circuit, *Reed* v. *SS YAKA,* 307 F.2d 203 (3d Cir. 1961), the court held, under *Smith* v.

The MORMACDALE, 198 F.2d 849 (1952) cert. den., 345 U.S. 908 (1953), that Waterman was not liable for the unseaworthiness of the SS YAKA because the unseaworthy condition arose after the bare boat charter was affected. On petition for rehearing, Chief Justice Biggs dissented and was joined by Circuit Judge Staley, who said at page 207:

> "I join Chief Judge Biggs in his conclusion in his dissent. I read his dissent as not disturbing *Smith* v. *MORMACDALE,* 198 F.2d 849 (C.A. 3, 1952) where the employer was also the shipowner."

The Supreme Court reversed the Third Circuit, thus returning the case to its former posture as a result of the holding at the trial level. The YAKA was liable in rem to Reed for unseaworthiness, and Waterman was to be indemnified by Pan-Atlantic. It is to be remembered that Pan-Atlantic was not the defendant in the case but was a third party defendant and was so treated by the Supreme Court. As such, the Longshoreman's and Harbor Workers' Compensation Act did not absolve Pan-Atlantic from its duty of providing a seaworthy vessel merely because of the happenstance that it employed longshoremen. This developed from the court's discussion of the *Ryan* decision and the expansion of the law that the stevedore company may be liable for indemnity to the shipowner in spite of the exclusionary provision of the Longshoremen's and Harbor Workers' Act.

In *Italia Soc.* v. *Oregon Stevedoring Co.,* 376 U.S. 315 (1963) the Supreme Court made clear that its decision in *Reed* v. *SS YAKA, supra,* did not change the rule that the Longshoremen's Act imposes exclusive liability

on the shipowner-employer as distinguished from a contractual undertaking which the employer may make to third parties. Mr. Justice White speaking for the majority of the Court stated at page 320:

> "At last Term in *Reed* v. *Yaka,* 373 U. S. 410, we assumed, without deciding, that a shipowner could recover over from a stevedore for breach of warranty even though the injury-causing defect was latent and the stevedore without fault. We think that the stevedore's implied warranty of workmanlike performance applied in these cases is sufficiently broad to include the respondent's failure to furnish safe equipment pursuant to its contract with the shipowner, notwithstanding that the stevedore would not be liable in tort for its conduct."

The following explanation appears in the margin:

> "If the stevedore is liable in warranty for supplying defective, injury producing equipment, of course the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S. Code, secs. 901-950, are no bar to recovery. This question was fully resolved in *Ryan* vs. *Pan-Atlantic Corp.,* 350 U.S. 124, 1956 A.M.C. 9. 'The Act nowhere expressly excludes or limits a shipowner's right, as a third person, to insure itself against such a liability either by a bond of indemnity, or the contractor's own agreement to save the shipowner harmless.' See also *Reed* vs. *SS YAKA.*"

The case at bar is completely distinguishable from the case of *Reed* v *SS YAKA, supra.* This case is not in rem, but is a direct suit by an injured ship repairman against his employer.

The appellant herein is not in the status of a third party contesting a claim for indemnity over against it by a vessel owner for the latter's having been found liable to an injured longshoreman, as in the *Reed* case. The appellant here is not using the exclusionary provisions of the Longshoremen's Act to contest such a claim being made against it in a circuitous fashion. The appellant here is contesting a claim being made directly against it by an injured repairman and therefore seeks the protection of the exclusive liability provisions of the Act to which it is entitled.

The Rationale Which Would Permit a Longshoreman to Sue His Employer Is Not Applicable to Appellee

If the case of *Reed* v. *SS YAKA, supra*, can be construed to permit a longshoreman to rely upon his employer-ship-owner's dual personality to sustain a cause of action against his employer, appellant submits that the rationale employed by the Supreme Court in permitting a longshoreman to do so is not applicable to a repairman in his employer's steady employ.

Longshoremen receive their job opportunities through the offices of a central hiring hall rather than from face to face meetings with their prospective employers. Employers, daily, make known their labor needs to a dispatcher at the hiring hall. The longshoremen are dispatched to their jobs without regard to whom their employer will be or on what vessel they shall work. Longshoremen are not at liberty to pick and choose their employers. Under such hiring practices it is conceivable and is often the practice for any individual longshore-

man to work for three or four different employers during any given week and upon a like number of different vessels of different design, nationality and origin. At times the longshoreman's employer will be an independent stevedore contractor, while at other times his employer will be a shipowner. In the former situation, an injured longshoreman, if he determines his injury was caused by the fault of a third person, could institute a cause of action against the vessel *in rem* or against the shipowner *in personam,* whereas in the latter situation he could not.

The majority of the Supreme Court in *Reed* v. *SS YAKA, supra,* felt that a longshoreman working for a shipowner was in need of the same protection as one employed by an independent contractor and stated at page 415:

> "We have previously said that the Longshoremen's Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results. We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing ship's service."

There are other cogent reasons why a longshoreman might be conceded more latitude in a suit against his shipowner-employer and these reasons are nowhere more succinctly expressed than in the language of the Hon-

orable William C. Mathes in *Hugev* v. *Dampsk International,* D.C. S.D. Cal., (1959), 170 F. Supp. 601 at pages 609 and 610:

> "In almost every instance, when a stevedoring contractor commences the work of loading or unloading a seagoing vessel, the ship has arrived in port only a few hours before. She may have been at sea for weeks or months. Almost always, she has ridden some heavy seas. Often she may have rolled and pitched through mountainous seas for days, taken thousands of tons of water over her decks, sailed through freezing and tropical weather, and been beaten by 100 mile an hour gales. Almost surely she will have been serviced by stevedores of varying degrees of competency in other parts (sic) throughout the world . . . It is reasonable to expect, then that many things may be wrong with a freighter and her equipment and appliances when she arrives in port; and she may well be a place of danger even as she docks. And all of these lurking dangers may be due entirely to the hazards of the ship's service."

The appellee herein is not a longshoreman. He is not called upon indiscriminately to work for various employers and upon various ships of varying nationality and design encountering the dangers which lurk thereon. The appellee had been in the appellant's employ for over one year prior to his injury (Tr. 7). He had worked only upon vessels solely owned by his employer (Tr. 86). The tug "BANNOCK" plies only the waters of the Columbia and Willamette rivers not subject to diverse weather conditions and tampering by foreign workmen.

For these reasons, appellee herein, should not be accorded the same latitude in suing his shipowner-employer as might be presumed to be accorded a longshoreman in *Reed* v. *SS YAKA, supra.*

The Tug "BANNOCK" Did Not Warrant Her Seaworthiness

The tug "BANNOCK" tied up next to a derrick crane at appellant's ship repair yard on December 17, 1963. She was surrendered to appellant's shore-based supervisory personnel to affect the intended repairs (Tr. 129). Major overhaul of both her main engines began at once which required the removal of all constituent parts, with the exception of her crankshaft and camshaft (Tr. 124); and which was raised from the vessel by use of the derrick crane and transported by fork lift to the machine shop for testing, refurbishing and replacement if needed. Mr. Robert Piatt testified that the valves were ground, sleeves were removed and replaced, and connecting rods were realigned and the heads were refinished. He further testified that it was necessary to take these parts into the machine shop because the vessel was not equipped to refinish them. He testified the heads had to be taken into town to be milled (Tr. 131, 132). The engine heads were so heavy that they had to be raised from the vessel by a crane (Tr. 131), and were thereafter transported to the machine shop by fork lift.

Thereafter on December 19, 1963, but after appellee was injured, the vessel was placed on appellant's drydock where all shafts were checked for alignment, and the starboard tail shaft was removed and replaced re-

quiring the removal of both rudders. While on drydock, both propellers were removed and replaced. The skin coolers needed to keep the engines cool were tested for leaks by surging soapsuds through the cooling system. Mr. Piatt testified that all of these repairs required the vessel to be drydocked. There were other items of repair not here mentioned.

Mr. Piatt testified and was corroborated by appellee that he was in charge of all the repair work.

The Captain, mate, engineers and cook were aboard the vessel at all times. The Captain had no part in supervising the repair work and he testified that Mr. Piatt was in charge of the vessel. The Captain and mate acted as watchmen to make sure no fires were started during the course of repairs (Tr. 112).

Appellee testified that he had connected the vessel to shoreside power the day prior to his injury and that he was preparing to disconnect the power when he was injured. Therefore, appellant assumes the tug "BANNOCK" was without electrical power.

Appellant recognizes that under the implied warranty of seaworthiness a shipowner is under a duty to maintain the vessel and its appurtenances in a reasonably safe condition suitable for the purposes intended and that this duty is not only owed to members of the crew but to all engaged aboard the ship in work historically performed by a seaman. *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946), 1946 A.M.C. 698; *Pope & Talbot* v. *Hawn,* 346 U.S. 406 (1953), 1954 A.M.C. 1. However, it has been authoriatitively settled that the implied war-

ranty of seaworthiness may not be invoked as a basis of liability where the vessel is a dead ship and has been withdrawn from navigation. *West* v. *U.S.,* 361 U.S. 118 (1959); *Latus* v. *U.S.,* 277 F.2d 264 (2 cir. 1960), cert. den. 364 U.S. 827; *McDonald* v *U.S.,* 321 F.2d 437 (3 Cir. 1963); *Bielowski* v. *American Export Lines,* D.C. E.D. Va. 1963, 220 F. Supp. 265; *McQuaid* v. *U.S.,* (3rd Cir. 164), 337 F.2d 483; *M/V HOPERANGE* (5 Cir. 1965), 345 F.2d 451.

In *West* v. *U.S., supra,* the vessel "MARY AUSTIN" was taken from the mothball fleet to Atlantic Port Contractors, Inc. for the purpose of reactivating the vessel. During the course of the work West was injured. The Supreme Court held that the vessel did not warrant her seaworthiness. The Court reasoned that the cases depended upon by West (*Sieracki* v. *Seas Shipping Co., supra,* and *Pope & Talbot* v. *Haun, supra,*) were, instead of undergoing general repairs, in active maritime service in the course of loading and discharging pursuant to a voyage. At page 122 the Court stated:

> "The MARY AUSTIN, as anyone could see, was not in maritime service. . . . This undertaking was not 'ship's work' but a complete overhaul of such nature, magnitude and importance as to require the vessel to be turned over to a ship repair contractor and docked at its pier for the sole purpose of making her seaworthy. It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case."

It is of no significance that the MARY AUSTIN was out of the moth-ball fleet whereas the tug BAN-

NOCK was not. The main point is that both had been temporarily withdrawn from navigation. As stated by Judge Solomon in *Dawson* v. *U.S.,* (D.C. of Oregon 1962) 1962 A.M.C. 2203 at page 2204:

> ". . .; and even though under Navy Regulations, the ship was considered to be in active service.
>
> "In my view, this case is controlled by West vs. United States, 361 U.S. 118, 1960 A.M.C. 15 (1959). The vessel involved in that case had been in the moth-ball fleet and was being reactivated at the time the libellant was injured. However, in my view, that is not a significant distinction."

In *United N.Y. & N.J. Pilots* v. *Halecki, Admx.,* 358 U.S. 613 (1959), the vessel there involved was in a shipyard for its annual overhaul. One job involved was the dismanteling and overhauling the ship's generators, requiring them to be sprayed with carbon tetrachloride which caused Halecki's death. In holding that Halecki's representatives were not entitled to rely upon the vessel's unseaworthiness the Court at page 617 stated:

> "The work that he (Halecki) did was in no way 'the type of work' traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was 'dead' with its generators dismantled."

A ship with her engines dismantled and without power from her generators is no less a "dead" ship than one with her generators dismantled.

This Court in *Berryhill* v. *Pacific Far East Line,* (9 Cir. 1956) 238 F.2d 385, affirmed the lower court which held that the ship there involved did not warrant her

seaworthiness. Although that vessel was in dry dock when Berryhill was injured, the philosophy therein expressed anticipated the holding of the Supreme Court in *West* v. *U.S., supra,* at page 387:

> "The facts in this instant case would extend the doctrine of absolute liability for unseaworthiness (*Mahnick* vs. *Southern Steamship Company,* 321 U.S. 96, 100, 1944 A.M.C. 1) beyond any previous holdings. Here the repairs had nothing to do with the loading or unloading the ship. The propulsion machinery of the vessel itself was being repaired. Not all repairs are "ship's work," to be performed historically or currently, by the crew."

The Honorable Judge Carter in *Gill* v. *TANCRED,* (D.C. N.D. Cal., 1957), 1958 A.M.C. 670, followed the rationale of *Berryhill, supra,* in holding that the vessel SS TANCRED did not warrant her seaworthiness. Judge Carter pointed out that the vessel's "main propulsion machinery" was damaged in an explosion and had to be towed into port. Judge Carter stated at page 672:

> . . . "the vessel was temporarily completely withdrawn from the mainstream of maritime commerce."

The same philosophy was expressed by the Third Circuit recently in affirming the lower court which held that a vessel tied to a pier for the purpose of undergoing repair prior to deactivation does not warrant her seaworthiness.

> "The warranty of seaworthiness does not extend to a shore based employee who, at the time of his injury, was engaged with others in the general over-

> haul and renovation of a vessel temporarily withdrawn from maritime service. Such work is customarily performed in a shipyard equipped for that purpose, and is not traditionally performed by a seaman."

McDonald v. *U. S.* (3d Cir. 1953), 321 F.2d 437 at page 440.

In conclusion we point out that the tug BANNOCK was undergoing major repairs under the supervision and control of the ship repair personnel, requiring such specialized equipment as a valve grinding machine, head milling machine, a derrick crane and fork lifts, none of which are normally carried aboard a tug.

The case law controlling this case, including the latest word from the Supreme Court, is that a vessel which has been withdrawn temporarily from maritime service while undergoing "general" repairs, does not warrant its seaworthiness.

It makes no difference if the vessel has been removed from maritime service because her lines have been filled with preservatives as in *West* or because her propulsion machinery is damaged by an explosion as in *Gill* v. *SS TANCRED* or because her propulsion machinery is intentionally dismantled as in *Halecki* and *Berryhill.*

This Court in deciding *Berryhill* v. *Pacific Far East Lines, supra,* in discussing the view of the Supreme

Court in *Pope & Talbot* v. *Hawn, supra,* stated at page 387:

> "The Supreme Court refers to repairs Hawn was making to the loading equipment as 'slight.' The purpose of his repairing was to permit loading 'to go on at once.' This would indicate a doubt in the Court's mind if any very general repairs to a ship could, or should, be included as 'ship's work.' "

Appellee Was Not Doing The Work Historically Performed by a Seaman

It is axiomatic that a shore based worker is not entitled to the Warranty of Seawoorthiness unless he is engaged, at the time he is injured; in work traditionally performed by a seaman.

> *Seas Shipping Co.* v. *Seiracki,* 328 U.S. 85 (1946); *Pope & Talbot* v. *Hawn,* 346 U.S. 406 (1954).

The appellee was injured aboard appellant's vessel on December 19, 1963. He initially boarded the vessel on December 18, 1963, for the purpose of equipping her with shore side electrical power (Tr. 13). The following day, appellee returned aboard the vessel, this time for the purpose of making arrangements to install a "whistle" light, a job which he neither started or finished (Tr. 126). At the moment of his injury, appellee testified that he was going ashore to disconnect the shore side power prior to dry docking the vessel (Tr. 89-90). Appellee is a man with several years experience as a seaman on ocean going vessels and he himself testified that in all of his experience as an electrician he had

never connected a vessel to or disconnected a vessel from shoreside power.

The District Court erred in holding that appellee was entitled to the warranty of seaworthiness.

CONCLUSION

The Longshoremen's and Harbor Workers' Compensation Act makes the payment of compensation the exclusive liability of an employer to his injured employee. The Courts are not free to rewrite the provisions of the Act and make what was intended as a complete immunity from direct suits for damages, no immunity at all.

The inescapable fact is that *Reed* v. *SS YAKA, supra,* was a suit brought by Reed against the property of a third person, and it is beyond question that it was so treated by the Supreme Court. There was nothing said by the Court in that case which would permit the appellee herein to bring a direct suit against his employer.

There might be reasons why a longshoreman would be allowed to bring a direct suit against his employer, but none of those reasons would permit a like suit by a ship repairman who is steadily employed by one employer and who works only upon vessels owned solely by his employer.

The latest word from the Supreme Court is that a vessel undergoing general repairs does not warrant its seaworthiness. It is incumbent upon this Court to hold

in accord with the law expressed by the Supreme Court in *West* v. *U. S., supra.*

Regardless of a vessel's status, before a shore-based worker can bring himself within the ambit of the warranty of seaworthiness, he must show that he was, at the time of his injury, engaged in work historically performed by a seaman. The appellee has shown only that he was injured aboard a vessel while engaged in a shoreside activity.

Respectfully submitted,

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CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in our opinion, the foregong brief is in full compliance with these rules.

EUGENE D. COX
Of Proctors for Appellant